In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1282

ARNOLD ROMANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals affirmed without opinion.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 1967. Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to April 17, 1967, and on that date the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the bail jumping statute, prior to its recent amendment, was unconstitutional on its face in

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that, when a defendant who forfeited bail was under a felony charge, the fact of such charge would be disclosed to the jury.

2. Whether petitioner's conviction should be reversed because the jury was told he was charged with a felony.

3. Whether petitioner was denied an opportunity to prepare a defense.

4. Whether the trial court properly refused to give requested instructions.

STATUTE INVOLVED

18 U.S.C. 3146, effective until September 20, 1966, provided:

> Whoever, having been admitted to bail for appearance before any United States commissioner or court of the United States, incurs a forfeiture of the bail and willfully fails to surrender himself within thirty days following the date of such forfeiture, shall, if the bail was given in connection with a charge of felony or pending appeal or certiorari after conviction of any offense, be fined not more than $5,000 or imprisoned not more than five years, or both; or, if the bail was given in connection with a charge of committing a misdemeanor, or for the appearance as a witness, be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> Nothing in this section shall interfere with or prevent the exercise by any court of the United States of its power to punish for contempt.

STATEMENT

After a jury trial, petitioner was convicted in the United States District Court for the Southern District of New York of jumping bail in violation of 18 U.S.C. 3146.[1] On October 28, 1966, he was sentenced to imprisonment for five years. The court of appeals affirmed without opinion.

George Senge, a bail bondsman in the District of Columbia, testified that on July 27, 1964, he executed a bail bond (not here in issue) in the amount of $50,000 in the Clerk's office at the United States Court House, District of Columbia (Tr. 49–53).[2] At that time, only one blank form was supplied (Tr. 75), and petitioner signed only one (Tr. 69–70). Subsequently, on October 1, 1964, in connection with proceedings to remove petitioner to the Southern District of New York, petitioner executed a second bond in the amount of $50,000. Petitioner's signature was acknowledged by one Hugh Kline, a clerk for the United States District Court for the District of Columbia (Tr. 49–54, 85–87).

On April 27, petitioner's case was called for trial in the Southern District of New York. Petitioner, who had been notified of the trial date (Tr. 127–129), was not present, and his bond was forfeited (Tr. 32–34).

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[1] Pursuant to the Bail Reform Act of 1966 (P.L. 89–465; 80 Stat. 214), which became effective on September 20, 1966, Section 3146 has been revised and recodified as 18 U.S.C. 3150.

[2] References are to the transcript of trial ("Tr."), and to the Appellee's Appendix in the court of appeals ("G."), both of which are on file with the Clerk of this Court.

On July 30, 1966, petitioner was arrested in Fort Lauderdale, Florida (Tr. 102–106). At the time of his arrest, petitioner was carrying false identification (Tr. 108–109).

ARGUMENT

1. Petitioner argues that 18 U.S.C. 3146 was invalid, either on its face or as applied, because the fact that a defendant was charged with a felony at the time he forfeited bail was an element of the offense and was therefore brought before the jury. Assuming this to be so, it would not render the statute unconstitutional. The fact that relevant evidence may disclose the commission of another crime does not bar the use of such evidence. *United States* v. *Montalvo,* 271 F. 2d 922, 927 (C.A. 2); *United States* v. *Krulewitch,* 145 F. 2d 76, 80 (C.A. 2); 1 Wigmore on *Evidence* §§ 215–216 (3d ed. 1940). *A fortiori,* a statute would not be unconstitutional merely because, as a necessary part of the proof, it became relevant to show that a defendant was merely charged with having committed a felony. There would ordinarily be no occasion to bring the particulars of the crime charged to the jury's attention.

Here the indictment (Pet. 5) simply alleged that bail had been given "in connection with a charge of felony contained in Indictment No. 64 Cr. 828 * * *." Petitioner never moved under Rule 7(d), F. R. Crim. P., to strike the reference to a felony from the indictment, and the indictment was neither read

nor given to the jury. At petitioner's request, the government was precluded from disclosing to the jury that the underlying crime was a narcotics offense (Tr. 16–17). At trial, the fact that petitioner had been charged with a felony was proved by introduction of docket entries and by testimony that petitioner was observed entering a plea of not guilty in the Southern District of New York.

Petitioner raised no constitutional objection prior to appeal; he can hardly object now to a procedure that he requested and assented to. In addition, since petitioner urges (Pet. 13–15) that the infirmities he purports to find in Section 3146 have been cured by the recent statutory revision (see n. 1, supra, p. 3), it is apparent that the principal issue tendered by the petition is of no continuing importance.

2. Petitioner was arrested on July 30, 1966. At petitioner's request, arraignment on the present indictment was continued from August 17 until August 26. (G. 2–3). On August 26, petitioner entered a plea of not guilty, and the court granted him an additional three weeks for the return of all motions (G. 4–6). Pre-trial motions were heard on September 26. Petitioner's motion for an inspection of the original bonds was denied, as the bonds were then on file in the Supreme Court. (G. 17–18, 20).[3] The case was ad-

[3] The original bonds were filed with the Clerk of this Court in connection with *Joseph Armone* v. *United States*, No. 603, O.T. 1966, certiorari denied, 385 U.S. 957.

journed to October 3 (G. 21). In the interim, the bonds were returned to the clerk of the court of appeals in order to facilitate inspection by petitioner. On October 3, petitioner again moved for a continuance of 30 days, protesting that he had not had time to have the original bonds examined by a handwriting expert (G. 23–24). The trial court observed that the original bonds were then located in the very same building as the trial court. Accordingly, petitioner was granted two days in which to complete his inspection of the bonds (G. 24).

Petitioner's contention (Pet. 17–18) that he was denied due process of law in that he was not given time to prepare a defense is without merit. At no time did petitioner attempt to make arrangements with the Clerk of this Court, or with the Clerk for the Second Circuit, to examine the bonds. Under these circumstances, the trial court did not abuse its discretion in denying petitioner's motion evidently made only for purposes of delay.

4. Petitioner's contention (Pet. 18–20) that the trial court erroneously refused to charge his theory of defense—that petitioner did not execute the bond on October 1—completely ignores the court's instructions with respect to the elements of the offense

(Tr. 187–188).[4] Even if there were sufficient evidence to warrant the requested charge,[5] the court's instructions adequately advised the jury that to convict they would have to find that petitioner did in fact execute the appearance bond on October 1, 1964. That the jury was acutely aware of the necessity of establishing this fact (the absence of which was argued to the

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[4] The court charged, *inter alia* (Tr. 187–188):

"Secondly [in order to convict], you have to be persuaded beyond a reasonable doubt that he [petitioner] was admitted to bail on that charge—that is, that he filed this bail bond in Washington as a condition for his appearance in the Southern District of New York."

[5] Petitioner suggests (Pet. 7) that a fair reading of the record discloses that he did not in fact execute the October 1 bond—that the October 1 bond was inadvertently signed when he executed the July 27 bond. No evidence to that effect, however, was introduced; indeed, as noted above (p. 3), it was categorically denied that two bond forms were supplied on July 27 (Tr. 75), or that petitioner signed more than one bond (Tr. 69–70). At best, petitioner's cross-examination of Senge revealed that the latter did not remember certain minor and insignificant occurrences, such as who signed the bonds first (Tr. 59, 90); who filled in the addresses on the bond forms (Tr. 66–67, 87–89); if both Senge and Romano used the same pen (Tr. 87); the exact words of the oath administered by the clerk (Tr. 67–68); the exact time of day when the bond was executed (Tr. 78–82); and whether or not he talked to the clerk (Tr. 81–86).

jury) is evidenced by the jury's request for a magnifying glass to examine the bonds (Tr. 198).

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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